COMMISSIONER BURNETT
SENT TO REGULAR MAILING LIST

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
744 Broad Street Newark, N. J.

BULLETIN NUMBER 102 January 8, 1936

1. APPELLATE DECISIONS - SCIARROTTA vs. TRENTON

JENNIE SCIARROTTA, Appellant, -against- CITY COUNCIL OF THE CITY OF TRENTON, Respondent	ON APPEAL CONCLUSIONS

John H. Kafes, Esq., Attorney for Appellant.

Adolph F. Kunca, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from the denial of her application for a plenary retail consumption license at 420 N. Clinton Avenue, Trenton.

Respondent contends that the application was properly denied because it was not filed until some time in September, 1935, and, therefore, was barred by virtue of respondent's license limiting Resolution No. 95 adopted July 9, 1935 which provides:

> "Applications for Plenary Retail Consumption, Plenary Retail Distribution and Club Licenses for the period ending June 30, 1936, be received by such Council from all applicants therefor up to and including the 31st day of July, 1935, and not thereafter, and the City Clerk be and he is hereby authorized to receive such applications on behalf of this Council."

Appellant concedes that her application was not filed until after July 31, 1935 but contends that in her case there are special circumstances which justify consideration of her application on the merits notwithstanding the passing of the time limit.

Last year, appellant had applied to the Trenton issuing authority for a consumption license for the period which expired June 30, 1935. Her application was denied and an appeal filed with the Commissioner. This appeal was dismissed because it appeared that appellant was not a citizen of the United States although she honestly believed that she was. Sciarrotta vs. Trenton, Bulletin #68, Item #9. She immediately applied for naturalization. During July, 1935, knowing of respondent's resolution, she tried to file her application requesting the municipal clerk to hold it until she received her citizenship papers, but he refused to accept it because she was not yet a citizen. She was finally

naturalized on September 21, 1935 and immediately thereafter filed her present application, which was denied, not on the merits, but solely because not filed before July 31, 1935.

It now appears that appellant even before her naturalization was an Italian citizen and therefore by virtue of a Federal Treaty existing between the United States Government and the Italian Government was not disqualified from receiving a license simply because not a citizen of the United States. Re: Trade Treaties, Bulletin #94, Item #15. This advice from the Secretary of State was not promulgated to the Trenton City Council until the issuance of Bulletin #94 on November 7, 1935 which was after the local hearing in the instant case which occurred on October 22, 1935. As late as October 10, 1935, the point so far as Italy was concerned was still doubtful. See Bulletin #92, Item #7.

Actually, therefore, she was eligible, so far as her citizenship was concerned, at all times to receive a license even though she didn't know about it. Her ignorance, however, is wholly excusable. She cannot be charged with what even the Department itself did not know. She did all that could reasonably be demanded of her in order to have her application filed in strict accordance with respondent's resolution.

After the instant case was heard on appeal on November 7th, the City Council of Trenton granted an alcoholic beverage license on December 10th to one Milton Mirkin, notwithstanding his application was not filed until after July 31, 1935. Unusual circumstances there appeared in that Mirkin had held a license for the previous licensing period ending June 30, 1935, but had lost his premises because of financial reverses and was not able to obtain new premises in time to apply for a license for the current period until after July 31st. It was not an afterthought on his part as the Trenton Countil had been duly informed of his intention to apply by letter dated June 17, 1935. The Council thereupon properly considered him as an applicant in good faith pending the securing of proper premises. The Mirkin license was issued under those exceptional circumstances notwithstanding the application was filed after the time limit had expired.

As there are equally exceptional circumstances in the instant case, it would be but fair to treat it on the same basis. Appellant's application was not considered on the merits but denied solely because the application had been filed too late.

The case is therefore remanded to respondent for determination of appellant's application on the merits.

D. FREDERICK BURNETT
Commissioner

Dated: December 26, 1935.

2. APPELLATE DECISIONS - FRANKLIN STORES v. BELLEVILLE

FRANKLIN STORES CO., a New Jersey Corporation,

Appellant,

-vs-

BOARD OF COMMISSIONERS OF THE TOWN OF BELLEVILLE (ESSEX COUNTY),

Respondent

ON APPEAL
CONCLUSIONS

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Louis B. Englander, Esq., by Milton D. Valentine, Esq., Attorney for Appellant.

Lawrence E. Keenan, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from the denial of its application for a plenary retail distribution license at #82 Washington Avenue, Belleville.

Respondent contends the application was properly denied by virtue of Section 10 of its ordinance of April 24, 1934, as amended November 27, 1934, limiting the number of plenary retail distribution licenses to 3 and the issuance of the allotted number.

Section 37 of the Control Act expressly authorizes municipalities to limit the number of retail licenses to be issued therein. Although such numerical limitation is subject to appeal it will not be upset on appeal unless clearly shown to be unreasonable either in its adoption or application to appellant. Ryman v. Branchburg, Bulletin #37, Item #8.

Belleville, with a population of approximately 29,000, has approximately 40 consumption licensees and 3 plenary retail distribution licensees. Although none of these distribution places is in the vicinity of appellant's premises, nevertheless it appears that there are 6 consumption places within 700 feet, one being within 60 feet and another within 100 feet. All of these consumption places may, under their licenses, sell alcoholic beverages in original containers for off-premises consumption. Appellant claims, however, that consumption places do not cater to the package trade and that women desiring to make such purchases would prefer to enter stores dealing only with package goods. Quite true. But they already have in the municipality three such stores. With present-day telephone and transportation facilities such stores can properly service large areas. Colonna v. Montclair, Bulletin #39, Item #8. We have not yet reached the point where neighborhood liquor stores are essential conveniences.

Appellant urges that since the Belleville Commissioners are of the admitted opinion that the welfare of the community would be better served by a substitution of distribution places

for existing consumption places that the limitation of plenary retail distribution licenses is unreasonable. Appellant overlooks the fact, however, that the majority of the City Commissioners, although preferring such substitution, are not of the opinion that this would justify a present increase in the number of distribution places in the absence of a decrease in consumption places.

Appellant has not sustained the burden of proof requisite to demonstrate that the community needs or will be more properly or conveniently serviced by another liquor store. Colonna v. Montclair, supra; Sussex County Drug Co. v. Newton, Bulletin #47, Item #3. It must therefore be concluded that the limitation was reasonable in its adoption.

Appellant further contends that the majority of the Belleville Commissioners were improperly motivated in denying its application. The evidence completely fails to support the charge. Moreover, whatever the motive, the ordinance, so long as it remains in effect, limits the power of respondent. It could not, even if it would, issue more than three plenary retail distribution licenses. The ordinance, so long as in force and until repealed or set aside, is binding upon the action of the Board of Commissioners itself. It would have no jurisdiction to issue a single extra license. Cf. Bachman v. Phillipsburg, 68 N. J. L. 552 (Sup. Ct. 1902).

The action of respondent is affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: December 26, 1935

3. RETAIL LICENSES - WHEN ISSUED BY STATE COMMISSIONER - DUTIES OF MUNICIPAL ISSUING OFFICIALS IN SUCH CASES - HEREIN OF APPLICATION FOR CLUB LICENSE WHERE AN OFFICER HAS BEEN CONVICTED OF A CRIME INVOLVING MORAL TURPITUDE.

January 6, 1936.

Tony E. Hunting, Commissioner
882 River Road
Fair Haven, New Jersey

Dear Mr. Hunting:

I have just come upon a memorandum reminding me that I promised to give you a ruling clarifying the responsibility that rests on municipal officials when application for a retail license is made, pursuant to the provisions of C. 44, P. L. 1934, directly to the State Commissioner.

A municipal license is primarily the municipality's responsibility. The purpose of C. 44, P. L. 1934, was to provide a means whereby licenses could issue when members of the local body had direct or indirect interest therein, without placing them in the position of having to pass upon their own applications. To that end, the issuance by local authority was prohibited and made instead a function of the State Commissioner to be exercised, in the words of the Act, upon the same terms and conditions and for

the same fee as other licenses of the same class are issued or are issuable by the municipal governing board or body. The administration of its issuance is the only difference. Once the license is issued by the Commissioner, it is no different from any other municipal retail license, being subject to the same local policing, regulation and control. Consequently, it is the duty of the municipality to determine in the first instance that the issuance would be consistent with local ordinances, resolutions, regulations and policies, and that the applicant is worthy and fully qualified, and the place suitable and proper.

It was for these reasons that I adopted the rule of procedure requiring that each such application be backed or endorsed by a resolution of the local issuing authority, setting forth that it had no objection to the issuance of the license and consented thereto and furthermore, was not aware of any circumstances or provisions of law or local ordinance which would prohibit same. See Bulletin 75, item 13. As I wrote to the Beverly, New Jersey Post of the American Legion (Bulletin 86, item 9, copy enclosed) this procedure was consonant with the principles of Home Rule.

In the particular case in which your question arose, it was the duty of the municipality not only to refuse to certify to the Commissioner its approval of the issuance of a license to the club because an officer was alleged to have been convicted of a crime involving moral turpitude, but also to investigate thoroughly and furnish to the Commissioner the full facts in order to guide him in his ultimate decision.

When it was disclosed that an officer of the applicant club had in fact been convicted of a crime involving moral turpitude, the license was withheld until said officer had severed his connections and been replaced with one fully qualified. There is no reason why the stringent qualifications required of applicants for other licenses should be relaxed in the case of club licenses.

Thank you and your fellow officials for cooperation.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

4. MUNICIPAL ORDINANCES - CLUB LICENSES - THE ORANGE EXPERIMENT - MUNICIPAL REQUIREMENTS APPROVED ALTHOUGH MORE STRINGENT THAN STATE REGULATIONS.

January 7, 1936.

William F. Christiansen
City Clerk
Orange, New Jersey

Dear Sir:

I have before me for consideration the following:

1. A resolution adopted May 28, 1935, amending the resolution of June 19, 1934, to raise the plenary retail consumption and distribution license fees.

2. An ordinance adopted June 18, 1935, to amend an ordinance regulating the sale and distribution of alcoholic beverages, fixing the club license fee and providing for the issuance of club licenses.

3. A resolution adopted September 3, 1935, appointing Mr. Elbert W. Hoffman a member of the Municipal Board of Alcoholic Beverage Control for a term of three years commencing June 12, 1935.

4. Mr. Hoffman's acceptance of the appointment.

They are approved as submitted with the following exceptio made with respect to Section B of the ordinance of June 18, 1935.

Section B of your ordinance provides: "No club license shall be issued except to organizations, corporations, or associations having at least one hundred members with dues paid to date, operating solely for benevolent, charitable, fraternal, social, religious, recreational, athletic or other similar purpose, and not for private gain, and then only in the event that the holder of such club license owns its own property; has been in existence and incorporated for at least ten years continuously immediately prior to the date of the application for said license, and further, that it is chartered by, affiliated with or connected with a recognized national organization having similar purposes."

The State rules and regulations governing club licenses promulgated April 27, 1934, Bulletin 25, item 1, were designed to impose conditions sufficiently stringent to insure their issuance only to bona fide clubs. Believing then, and as late as the ruling in Re Atlantic City, Bulletin 71, item 1, that they accomplished that purpose, I refused to approve a municipal ordinance that sought to impose still more stringent conditions. In that, I now believe, candidly that I was mistaken.

For experience has shown that the privilege has been sought and gained in many cases by mushroom organizations of the neo-prohibition type which make a nominal compliance with the letter of the rules but with tongue in cheeck so far as intent to live up to the spirit of the regulations. Some municipal officials have told me that they have in some cases given the benefit of the doubt to organizations of whose social sincerity they were not really sure for fear either of political reprisals or of unwittingly barring a truly bona fide club. Other municipalities have gone the whole length the other way and refused all club licenses - good faith or no - which option they have by statute. Both extremes can be avoided in large measure by raising the requirements of this privilege. Such tightening is needed from the enforcement angle as well. Police chiefs tell me that they have much trouble with so-called organizations that, posing as bona fide clubs, serve as a convenient mask for criminal activities. Plenary licensees complain that all too often clubs are organized for commercial exploitation and indulge in unfair competition with them at a lower priced license fee. My staff confirms these reports. Therefore, I shall approve your ordinance as far as I can and watch the Orange experiment with keen interest with a view to adopting for State-wide use such of its stringent requirements as experience may justify.

The new conditions superimposed by your ordinance upon the present State regulations are: (1) that a club license be issued only to organizations, corporations, or associations having

at least one hundred members with dues paid to date; (2) that the applicant own its property; (3) that the applicant has been in existence and incorporated for at least ten years continuously immediately prior to the date of the application; (4) that it be chartered by, or affiliated or connected with a recognized national organization having similar purposes.

These new conditions are approved as submitted except as follows:

(2) is disapproved because unnecessarily severe in times like these. It is common knowledge that many bona fide clubs have lost their homes like individuals through no fault of their own. The only thing they can do is to retrench and lease.

(3) is approved so far as ten years existence is concerned but disapproved as to the requirement of incorporation. That is not a purification process. Moreover, it is contrary to the statute, Sec. 13, sub. (5) which expressly provides that club licenses may be issued to corporations, associations and organizations. You cannot, therefore, insist upon incorporation.

The scope and extent of approvals by the Commissioner of local regulations and their review, should an appeal be taken from their application in given instances, are governed by the principles set forth in Bulletin 43, item 12 and Bulletin 34, item 5.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

5. RULES GOVERNING WAREHOUSE RECEIPTS LICENSES

1. Application to the State Commissioner of Alcoholic Beverage Control for a warehouse receipts license shall be made upon a prescribed application form, submitted in duplicate, and accompanied by the prorated annual license fee. No publication of notice of intention shall be required.

2. Applicants for warehouse receipts licenses shall submit statements and questionnaires pursuant to the Regulations Governing Identification of State Licensees and Their Employees.

3. The holders of warehouse receipts licenses may sell receipts thereunder only to New Jersey licensed manufacturers and wholesalers authorized to sell the beverages covered by the receipts; provided, however, that where the warehouse receipts licensee is also the holder of such New Jersey manufacturer's or wholesaler's license, sales of receipts may be made to New Jersey licensees of any class authorized to purchase the beverages covered by the receipts. Sales of receipts not in accordance with the foregoing may be made only pursuant to special permit issued by the State Commissioner of Alcoholic Beverage Control.

4. No warehouse receipts licensee shall sell or offer for sale any warehouse receipt given upon the storage of alcoholic beverages unless such licensee is the owner of the receipt and

in possession and control thereof at the time of the solicitation or sale. Where such licensee enters into a contract for the sale of a warehouse receipt, he must at all times during the continuance of the contract and pending consummation thereof remain in possession and control of the receipt.

5. No warehouse receipts licensee shall sell or offer for sale any receipt, certificate, contract or other document given upon the storage of alcoholic beverages unless a specimen of such receipt, certificate, contract or other document has been first filed with the Department of Alcoholic Beverage Control.

6. No individual shall sell or offer for sale or solicit any order for the purchase or sale of any receipt, certificate, contract or other document given upon the storage of alcoholic beverages unless such individual is the holder of a solicitor's permit issued pursuant to the Rules and Regulations Governing Solicitors' Permits; provided, however, that this shall not apply to any individual licensee himself or the individual members of a partnership licensee.

7. Warehouse receipts licensees shall comply with all regulations promulgated by and all requirements pertaining to bonds and reports imposed by the State Tax Commissioner pursuant to the provisions of the Alcoholic Beverage Tax Act.

D. FREDERICK BURNETT
Commissioner.

6. RULES GOVERNING WAREHOUSE RECEIPTS LICENSES - COMMENT.

January 6, 1936.

The foregoing Rules, hereby promulgated, are effective immediately. An open meeting pursuant to notice widely distributed was held on December 19, 1935 to discuss the subject, numerous conferences have been held and the matter has received careful study.

Widespread speculation by the general public in liquor warehouse receipts would cause serious harm to the industry and probable loss to many purchasers. Consequently, the rules restrict sales to the general public except pursuant to special permit. To eliminate bucket-shop transactions, the rules require that the seller own and possess the receipt at the time of sale. It is believed that the rules in their present form adequately protect the public and the industry without being unduly burdensome. However, the actual operation of the rules will be carefully observed; if additional safeguards are necessary, they will be adopted and if any of the present restrictions are found to be unnecessary, they will be eliminated.

D. FREDERICK BURNETT
Commissioner

7. IMPORTATION INTO NEW JERSEY OF ALCOHOLIC BEVERAGES FOR PERSONAL CONSUMPTION - DISCUSSION OF PURPOSE AND CONSTITUTIONALITY OF STATUTORY RESTRICTION

The following article, by Arthur Krock, of extreme interest and profit, appeared in the New York Times on December 27th, 1935. Mr. Jacobs' reply, in behalf of the Department, is also worthy of thought.

"IN THE NATION

"MILK CASE RULE CONFRONTS STATE LIQUOR BARRIERS

"By ARTHUR KROCK

"To laymen, remembering what Mr. Justice Cardozo said for the unanimous Supreme Court in the Seelig milk price-fixing case in March, 1935, the efforts of New York and New Jersey local authorities to prevent or limit the importation of liquor from Connecticut and Pennsylvania respectively because it is sold cheaper in those States, seem violative of the court's reasoning.

"Section 2 of the Twenty-first Amendment to the Constitution prohibits the transportation or importation of liquor into any State for delivery or use in violation of its laws. But in the light of the Seelig decision, may a wet State set up an economic barrier against liquor from another wet State on a basis of price, by licensing or any other statute? Clarification of this point is needed from the bench.

"Westchester County officials recently undertook to prevent its citizens from bringing into the area from adjacent Connecticut, for private use, liquor which could be purchased more cheaply across the line than in that county. New Jersey State officers seek to limit to the State's legal import quota of two quarts consignments of less expensive spirits of the same brands bought by its citizens in Pennsylvania. Mr. Justice Cardozo was explicit in holding that an effort of this type, with respect to milk obtained by the Seelig Company from producers in Vermont more cheaply than the New York State fixed price, was an attempt by one State to set up tariff barriers against another, and so was unconstitutional. He pointed out that Congress expressly reserved control of interstate commerce and denied to any State the right to set up tariff barriers against another lest the United States be turned into a sort of economic Europe.

"WEBB-KENYON ACT NO FACTOR

"The Webb-Kenyon act, giving a State the right to prohibit the importation from another of intoxicating liquors, and which was held constitutional by the Supreme Court, presented a logical hurdle to Mr. Justice Cardozo in his emphasis on free interstate commerce, or so it seemed to lay readers. But this is how he surmounted that exception:

"What the State does is no more than to apply its domestic policy, rooted in its conceptions of morality and order,

to property which, for such a purpose, may fairly be deemed to have passed out of commerce and to be commingled in an absorbing mass.

"But the straightest-faced Attorney General or County Attorney in New Jersey or New York would find it difficult to contend that the barriers in Westchester County and New Jersey against cheaper liquor from over the border were raised in the name of 'morality and order'. The purpose was simple: to force New Yorkers and New Jersyites to pay the local price and consume locally-bought liquor so that the State and county licensing and taxation systems would be maintained. It is strictly a revenue, and therefore a tariff, issue, and the Supreme Court in the Seelig case was firm in saying that no State had any rights of this sort.

"New York wanted the Seeligs to sell their milk, both in cans and in bottles, in New York State for the price fixed by the Legislature. The Seelig Company, having bought its supply cheaper in Vermont than the legal New York rate, was selling it more cheaply. The court, conceding that the price of milk bought and sold in the State was properly a matter for legislative determination, ruled, however, that this did not apply to milk purchased more cheaply elsewhere and imported for sale.

"NO ECONOMIC ISOLATION

"In the course of his opinion for all his colleagues, Mr. Justice Cardozo seems to have banned such recent activities as those in New York and New Jersey against their sister States in the following language:

> "What is ultimate is the principle that one State in its dealing with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the State of destination with the aim and effect of establishing an economic barrier against competition with the product of another State or the labor of its residents.
>
> "Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result.
>
> "The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purposes of suppressing competition from without and leading inescapably to the suppression so intended.

"What was thus so positively and unanimously set down for an importer certainly must apply to individual citizens moving from their homes to markets in another State, unless the court is expected to hold that, when the commodity is liquor, its definition of interstate commerce no longer obtains. Other-

wise the power of a county or State to prevent its citizens from importing more cheaply from another could easily be extended to any article in commerce. To a lay mind the upshot of sustaining the Westchester County and New Jersey tariff barriers would be the erection of forty-eight separate interstate commerce sovereignties in the nation, with barbed-wire boundaries and octrois at their borders."

January 3, 1936.

Mr. Arthur Krock,
c/o New York Times,
New York City

Dear Sir:-

I read with considerable interest your article appearing in the New York Times, Friday, December 27, 1935, and captioned "Milk Case Rule Confronts State Liquor Barriers".

I agree entirely with the view expressed by Mr. Justice Cardozo on behalf of the Supreme Court in Baldwin vs. Seelig, 294 U.S. 511 (1935), that, in general, a State may not place itself, in its dealings with other States, in a position of economic isolation and may not create a protective tariff in favor of local producers. I do not agree, however, that the provision of the New Jersey Control Act, relating to importations for personal consumption, falls within the letter or spirit of the proscription there enunciated.

Unlike statutory provisions elsewhere, the New Jersey Act does not prohibit absolutely importations for personal consumption. On the contrary, it provides that such importation may be effected daily to an extent of one-quarter barrel of malt beverages and one gallon of wine and two quarts of other alcoholic beverages; and greater amounts may be imported for personal consumption pursuant to special permit, which may be obtained upon payment of a $5.00 fee.

Examination of the history and operation of the original New Jersey Act and its amendments and supplements discloses ample evidence that the restriction against importation is grounded substantially upon considerations of control, entirely apart from any desire to impose an economic barrier. The original Act, enacted in December, 1933, contained a blanket exemption in favor of the manufacture, transportation, etc. of alcoholic beverages intended for personal consumption; to accomplish effective administration and enforcement it was essential to eliminate this exception for it afforded a convenient "out" to violators. After the blanket exception had been eliminated, the Act still permitted, without license or restriction, importation and other transportation of alcoholic beverages intended for personal consumption not exceeding one-half barrel of malt beverages and five gallons of wine and 12 quarts of other alcoholic beverages within any consecutive period of 24 hours. In so far as transportation entirely within the State was concerned, the provision was not troublesome since such transportation allegedly for personal consumption could readil

be checked. No comparable check was available, however, with respect to importations and alcoholic beverages were often brought into the State and resold, although imported avowedly for personal consumption. As a result, substantial quantities of alcoholic beverages, over which the State Commissioner had no means of control and on which taxes had not been paid, were dealt with freely. The present statutory restriction was enacted in June, 1935, and has gone a long way towards effecting the intent of our Legislature to place all alcoholic beverages trafficked within this State under the control of the State Commissioner.

In the light of the foregoing, the New Jersey regulation might be sustained, even aside from constitutional and statutory provisions relating to intoxicating liquors, within the line of cases upholding inspection laws, game laws, laws intended to curb fraud, restrictions on motor cars used in interstate commerce, etc. Cf. Savage vs. Jones, 225 U.S. 501, 526 (1912); Bradley vs. Public Utilities Commission, 289 U.S. 92 (1933). The revenue obtained by the State upon the issuance of a special permit hardly compensates for actual cost and is incidental; the major consideration is that control over a product inherently susceptible to abuse is effected pursuant to an exercise of the State's police power.

The Seelig case did not deal with intoxicating liquors and therefore the Court had no occasion to consider and did not consider the effect of the Webb-Kenyon Act of 1913 and the Second Section of the 21st Amendment. The Webb-Kenyon Act provides that the transportation of intoxicating liquor from one State into another in violation of any law thereof is prohibited. This Act is still in effect. Cf. McCormick & Co. vs. Brown, 286 U.S. 131 (1932); Premier Pabst Sales Corp. vs. Grosscup, infra.

In Clark Distilling Co. vs. Western Maryland Railway Co., 242 U.S. 311, 324 (1917), the Court expressed the effect of the Webb-Kenyon Act in the following language:

> "that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

The Court there held that a State could forbid the shipment into the State of liquor intended to be received or possessed for personal use even in the absence of a direct prohibition against the possession of liquor for personal use. See also Seaboard Air Line Railway vs. North Carolina, 245 U.S. 298 (1917), where the Court sustained a State law prescribing conditions upon which importation could be effected:

> "For some years it has been the established policy of North Carolina, 'approved by popular vote and expressed and enforced by the general and many local statutes, that, except in very restricted instances, the manufacturing and sale of intoxicating liquors shall not be allowed.' Smith vs. Southern Exp. Co. (1914), 166 N.C. 155, 157. Since our decision in Clark Distilling Co. v. Western Maryland

R. Co., 242 U.S. 311, 320, 324, it has not been open to serious question that the Webb-Kenyon law is a valid enactment; that 'its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught;' and that under it a State may inhibit shipments therein of intoxicating liquors from another by a common carrier although intended for the consignee's personal use, where such use is not actually forbidden. Plainly, therefore, after that enactment nothing in the laws or Constitution of the United States restricted North Carolina's power to make shipment of intoxicants into Wake County a penal offense irrespective of any personal right in a consignee there to have and consume liquor of that character.

"The challenged Act, instead of interposing an absolute bar against all such shipments as it was within the power of the State to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less."

The 21st Amendment has carried the foregoing into the Constitution by prohibiting the transportation or importation of liquor into any State for delivery or use in violation of its laws. In the recent case of Premier Pabst Sales Corp. vs. Grosscup, decided on December 10, 1935, by Circuit Judge Thompson and District Judges Dickinson and Kirkpatrick, sitting in the United States District Court for the Eastern District of Pennsylvania, the Court sustained the Pennsylvania Act restricting the importation of beer. The Court's holding that the Commerce Clause was inapplicable is amply supported by the authorities cited above. The Court's further holding that the Equal Protection Clause was not violated by Pennsylvania's discrimination in favor of local products need not be considered here since the restrictions against importations contained in the New Jersey Control Act are non-discriminatory and apply equally to residents as well as all other persons. Cf. Triner vs. Arundel, 11 Fed. Supp. 145 (D. Minn. 1935).

One final thought. Your article concludes with the fear that the result of sustaining the New Jersey restriction against the importation of alcoholic beverages would be "the erection of forty-eight separate interstate commerce sovereignties in the nation, with barbed-wire boundaries and octrois at their borders". In this connection the following language of the Supreme Court in the Clark Distilling Co. case may be of interest:

"Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon; that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all

articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all dominates and controls the question here presented; i.e., the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by Government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might assert an enlarged power as to subjects to which, under the Constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power asserted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace." (p.332).

I trust that even if the foregoing does not dispel your doubts as to the constituionality of the provision under consideration, it alleviates your fears with respect to the legislative purpose and the extent to which it might possibly be carried.

Very truly yours,

NATHAN L. JACOBS
Chief Deputy Commissioner
and Counsel

8. RULES CONCERNING CONDUCT OF LICENSEES AND THE USE OF LICENSED PREMISES - GAMBLING - PENALTIES.

January 7, 1936.

Mr.____ ____,Municipal Clerk,

Dear Mr. _____:

I have read the report of the proceedings before your Borough Council in the matter of the charges preferred against _____ _____,for permitting patrons of his place to play cards for money, with keen interest. I note that the judgment of your Board was that his license be suspended for 24 hours.

I realize that gambling of itself does not constitute moral turpitude; that at home after home contract bridge and pinocle are played for stakes; that wagers are made on golf, on fights, on football games, on elections. While lotteries are forbidden and gambling is by statute made a crime, there does seem to be a disposition on the part of the American public to take a chance, to speculate, to put money stakes on so many things they do. This, admittedly, makes a very difficult situation for enforcement officials to confront.

I believe that the proper course for us to take is that, so long as the law against gambling remains on our statute books, it is our duty to enforce it, at least so far as concerns licensed premises. Otherwise, commercialized gambling will get a foothold in such places, leading to racketeering and other evils which will quickly get out of hand if we do not keep the lid on all the time even in small matters out of which grow the larger if the impression once gets around that nobody cares. Let us stop at the source the abuses that brought Prohibition.

I am gratified, therefore, that you have imposed a penalty, even though that penalty is but one day. If this proves a sufficient deterrent, well and good. If, however, your Borough Council finds that the penalty is not enough, then I believe that your Borough Council will take the initiative in increasing the penalty and giving the increased penalty wide publicity as a deterrent measure so that all licensees will know that we mean business. Honest licensees, who scrupulously comply with the law and do not permit gambling on their premises, complain bitterly that they pay high license fees into local municipal treasuries but, so often, get little or no protection against those cheaters in their own trade who take a chance to reap a major profit if not detected, but if caught, get off with minor penalty. They are prone to jump to the conclusion that a one day suspension encourages trifling. If they themselves think so, we, whose duty it is to enforce the law, may well give ear to their desire for strict regulations. They believe, as I have told them, that repeal is on trial. For the sake of their economic future they ask for stringent penalties. It is all grist in our mill of law enforcement.

Cordially yours,
D. FREDERICK BURNETT
Commissioner

9. DRUNKEN DRIVER CAMPAIGN - MUNICIPAL RESOLUTION REQUIRING DISPLAY OF POSTERS APPROVED.

January 6, 1936.

Wilfred G. Turner,
City Clerk,
Union City, New Jersey.

Dear Sir:

I have before me the resolution adopted by your Board of Commissioners on June 20, 1935, directing that the poster issued by the Motor Vehicle Department in its campaign to reduce accidents resulting from drunken driving be prominently displayed at all licensed premises in Union City where alcoholic beverages are sold.

The regulation is approved as submitted.

Kindly thank the Commissioners for their cooperation

Very truly yours,

D. Frederick Burnett
Commissioner